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IN THE

Supreme Court of the United States

October Term, 1929.

No. 536

R. E. GRAHAM and E. E. FOSTER, Co-partners, Doing Business Under the Firm Name of MILLIE FRANCIS OIL COMPANY, a Co-partnership,

Petitioners,

v.

REX B. GOODCELL, Former Collector of Internal Revenue of the United States of America, in and for the Sixth Collection District, State of California,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT.

JOHN E. HUGHES,
Counsel for Petitioners.

U. S. Printing Company, 2817 N. Halsted St., Chicago, Ill.

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PETITION.

JOHN E. HUGHES, in behalf of R. E. GRAHAM and E. E. FOSTER, co-partners, doing business under the firm name and style of MILLIE FRANCIS OIL COMPANY, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, for the

Ninth Circuit, entered in the above entitled case on November 4, 1929, reversing the judgment of the District Court for the Southern District, Central Division, of California, in the above case. The decision sought to be reviewed is reported in *35 F. (2d) 586.*

QUESTIONS PRESENTED.

1. What is the proper construction of *Section 611 of the Revenue Act of 1928?*

2. If *Section 611 of the Revenue Act of 1928,* which was enacted May 29, 1928, is retroactive and if it takes away a clear right of the taxpayer to recover a judgment against the respondent, which right existed at the time the petition and answer were filed and at the time the issues were joined in the case at bar, then does said Section deprive the taxpayer of proprty without due process of law and thus violate the Fifth Amendment to the Constitution of the United States?

STATEMENT.

It will be conceded that the respondent, by threats to seize and sell petitioners' property, compelled them to pay to him, under protest, additional income taxes for the year 1917 after their collection was barred by the Statute of Limitations, and it will also be conceded that at the time petitioners' complaint and respondent's answer were filed in the United States District Court the petitioners had a clear and undisputed right to recover a judgment against the respondent on the authority of the decision of this Court in the case of *Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.*

The facts in the case were stipulated by the parties and the case was submitted to the District Court on that stipulation, which appears in the record at pages 11 to 14. The petitioners filed their partnership income and excess profits tax returns for the year 1917 on March 22, 1918, and paid the taxes due thereunder. On the January, 1920, list the Commissioner of Internal Revenue made an assessment of additional taxes against the petitioners in the amount of $7034.71. On February 11, 1920, the petitioners filed a claim for abatement of the amount of the additional taxes so assessed with interest thereon. The Commissioner of Internal Revenue rejected the said claim for abatement on December 27, 1922. The Statute of Limitations barred the respondent's right to collect the said taxes on March 22, 1923. *(Bowers v. New York & Albany Lighterage Co., 273 U. S. 346.)* On November 19, 1924, the respondent served a notice and demand on the petitioners for the payment of the said additional tax of $7034.71, together with interest in the sum of $2004.69, and in his official capacity threatened to enforce and compel the payment of said taxes and interest by distraint and sale of the petitioners' property. The petitioners, being prevented by statute from procuring an injunction to prevent the seizure and sale of their property, did, under duress and protest, pay to the respondent as Collector of Internal Revenue the said sum of $9039.40, making such payment in two installments, viz: the sum of $2039.40 on November 29, 1924, and the sum of $7000.00 on December 3, 1924. On September 25, 1925, petitioners duly filed a claim for the refund of the said sum of money upon the ground that the amount was illegally and wrongfully collected, in that *Section 250 (d) of the Revenue Act of 1921* barred the collection of it after the expiration of five years from the date upon

which petitioners' returns were filed. The said claim was rejected by the Commissioner of Internal Revenue on January 13, 1926. On December 23, 1927, petitioners filed their complaint in the District Court, seeking the recovery of said taxes and interest, on the ground that the same was collected from them under protest and duress and after the Statute of Limitations had barred the right to collect it. The respondent answered the complaint on April 13, 1928. The case was submitted to the Court on the written stipulation referred to and the Court in an unreported opinion gave judgment for the petitioners on January 3, 1929, which judgment was reversed by the Circuit Court of Appeals, for the Ninth Circuit, in *35 F. (2d) 586.*

STATUTES INVOLVED.

The statutes involved are *Sections 607 and 611 of the Revenue Act of 1928,* which was enacted May 29, 1928, and which are as follows:

> "Sec. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.
>
> Sec. 611. COLLECTIONS STAYED BY CLAIM IN ABATEMENT. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part

thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court in the case at bar.

2. In failing to hold that *Section 611 of the Revenue Act of 1928* did not apply to the case at bar because it did not appear therein that the collection of the tax for the recovery of which the District Court had rendered judgment was stayed by the claim in abatement.

3. In holding that said *Section 611* was retroactive to the extent of depriving a taxpayer of the right to recover a judgment, which right clearly existed at the time said section was enacted.

4. In failing to hold that said *Section 611*, if construed to deprive a taxpayer of the right to a judgment which clearly existed at the time the wrong was done by the respondent and at the time the issue was joined in the District Court in the case at bar, deprived taxpayers of property without due process of law and was in violation of the Fifth Amendment to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The decision in the present case is in conflict with the decision of the Circuit Court of Appeals, for the Fifth Circuit, in the case of *United States v. Burden, Smith &*

Co., 33 F. (2d) 229; and the opinion in the case at bar so concedes.

A great many cases are pending in the various District Courts which involve a proper construction of the foregoing sections, and the decisions of the District Courts are sharply in conflict. Decisions in the District Courts which are in conflict with the decision in the case at bar are: *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197 (Southern District of Illinois); Cutcheon v. Rafferty, 34 F. (2d) 708 (Eastern District of New York); Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542 (Western District of Pennsylvania); Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135 (Western District of Pennsylvania); Bessemer Coal & Coke Co. v. Heiner,* decided November 8, 1929, *(Western District of Pennsylvania, No. 5642),* unreported to date; *The Sugerland Industries v. Bass,* decided November 12, 1929, *(Western District of Texas, No. 1157),* unreported to date; *The National Carton Co. v. Reinecke (Northern District of Illinois),* unreported to date.

The following decisions of the District Courts agree with the decision in the case at bar: *L. H. Woodward Co. v. Anderson, 34 F. (2d) 709 (Utah); Wright & Taylor v. Lucas, 34 F. (2d) 328 (Kentucky); Regla Coal Co. v. Bowers,* decided November 13, 1929 *(Southern District of New York, No. L-41-328).*

The Treasury Department in *General Counsel's Memorandum 5665,* published in *Cumulative Bulletin VIII-1, at page 130,* has held that the mere filing of a claim in abatement does not operate as a stay of the collection of taxes within the meaning of *Section 611,* and this holding

is apparently in conflict with the decision in the case at bar. And so is *G. C. M. 2757*, published in *C. B. VII-2, at p. 302*. Not only are there a very large number of cases pending in the various District Courts, but there are a large number of claims pending in the Treasury Department involving the proper construction of these sections and large sums of money are involved therein, and for these reasons it is thought that the Government will not oppose the granting of certiorari in the case at bar in order that the said sections may be finally construed and that the conflict of opinion between the Circuit Courts of Appeal and the various District Courts may be set at rest.

Wherefore, it is respectfully submitted that this petition should be granted.

JOHN E. HUGHES,
Counsel for Petitioners,
First National Bank Bldg.,
Chicago, Illinois.

January 18, 1930.

BRIEF IN SUPPORT OF PETITION

OPINION OF THE COURT

The opinion of the Court below is reported in *35 F. (2d) at page 586,* and was rendered November 4, 1929.

JURISDICTION

The jurisdiction of this Court is invoked under *Section 240 (a) of the Judicial Code* as amended by the Act of February 13, 1925.

ARGUMENT

Petitioners deem it unnecessary to repeat the argument of the United States Circuit Court of Appeals, for the Fifth Circuit, in the case of *Burden, Smith & Co., 33 F. (2d) 229,* or to repeat the arguments made by the various District Courts which have rendered opinions sustaining petitioners' contention. Attention is particularly called, however, to the opinion of the Court in the case of *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197.*

We desire briefly to direct the Court's attention to the following points:

1. *Section 607 of the Revenue Act of 1928,* by its express terms deals with taxes assessed prior to the enactment of the *Revenue Act of 1924,* which was enacted June 2, 1924. The suit in the case at bar is brought to recover taxes assessed for the year 1917. The *Revenue Act of 1917* did not contain any provision for the filing of a claim in abatement or for staying the collection of the tax upon the filing of such claim. The *Revenue Act*

of 1918, however, in *paragraph 14 of Section 234,* contained a provision for the filing of a claim in abatement for the taxable year 1918 based on the fact that a substantial loss has been sustained arising from shrinkage in inventory value, and it further provided:

> "In such case payment of the amount of the tax covered by such claim shall not be required until the claim is decided, but the taxpayer shall accompany his claim with a bond in double the amount of the tax covered by the claim, with surety satisfactory to the Commissioner, conditioned for the payment of any part of such tax found to be due, with interest."

This provision for the filing of a claim in abatement and for staying the collection of the tax was the one considered by this Court in the case of *John Barth Company v. United States, 279 U. S. 370,* and is quoted therein at pages *373* to *374.* Manifestly, it could have no application to the case at bar, because this provision of the law only dealt with taxes for the year 1918, whereas in the case at bar the taxes were for the year 1917, and the 1917 Act contained no provision for the filing of abatement claims or for staying the collection of taxes upon their filing.

2. It will be noted that *Section 611 of the Revenue Act of 1928* does not prohibit recovery in a suit, but merely provides that the payment "shall not be considered as an overpayment under the provisions of *Section 607*" of that Act. As pointed out by the District Court (Oregon) in *Giles & Jenks v. Huntley, Collector, 29 F. (2d) 904,* plaintiffs do not and did not base their right to recovery upon *Section 607 of the Revenue Act of 1928.* Their suit was filed before the enactment of that Section, and if that Section had never been enacted they would have had a right to recover under *Sections 3220, 3226* and *3227*

of the Revised Statutes, as construed by this Court in the case of *Bowers v. New York & Albany Lighterage Company, 273 U. S. 346.* Reading and applying *Section 611* literally, it is immaterial whether the overpayment is one within the terms of *Section 607* or not, because petitioners' right to recovery is not predicated on that Section.

In the opinion in the case of *Bessemer Coal & Coke Company v. Heiner,* not yet reported, Judge Schoonmaker said:

> "*Section 611 of the Revenue Act of 1928* can only be made to apply to the instant case by giving it retroactive effect. This should only be done when the legislative purpose to do so plainly appears. *United States v. Magnolia Oil Company, 276 U. S. 160, 162; United States v. Russell, 278 U. S. 181, 187.* There are no words in the Act which can clearly be construed as a ratification of the collection of a tax which was barred by the Statute of Limitations at the time it was paid.
>
> The views we here express are in accord with the views of Judge Gibson of this Court in *Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542;* those of Judge McVicar of this Court, in *Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135;* and those of Judge Deaver of the District Court, for the Middle District of Georgia, in *Burden Smith & Co. v. United States, 32 F. (2d) 231.*"

3. However, even if that Section be construed to apply to a case such as the case at bar, yet the reversal of the judgment of the District Court by the Circuit Court of Appeals is erroneous because it does not appear from the stipulation that the collection of the taxes sought to be recovered was stayed by the claim in abatement. In *General Counsel's Memorandum No. 5665,* pub-

lished in *Cumulative Bulletin VIII-1, at page 130,* the General Counsel for the Bureau of Internal Revenue says:

> "The mere filing of a claim in abatement does not satisfy the provisions of Section 611."

And that the filing of a claim in abatement does not in and of itself operate to stay the collection of the taxes, was also recognized in *General Counsel's Memorandum 2757,* published in *Cumulative Bulletin VII-2, at page 302.* In numerous cases, such as that dealt with in the case of *John Barth Company v. United States, 279 U. S. 370,* a bond was required, and in such cases it was the bond and not the abatement claim which stayed the collection of the taxes. In other cases Collectors refused to withhold the collection of taxes upon the filing of an abatement claim unless they were supplied with statutory written consents to the extension of the Statute of Limitations. In a number of these cases the time agreed upon in these consents for the collection of the taxes was allowed to expire before they were collected, and in such cases it is now sought to retain them by claiming that the collection was stayed by the claim in abatement, when, as a matter of fact, in such cases it was the written consent to the extension of the Statute of Limitations and not the claim in abatement which stayed the collection.

Whether the collection was stayed by a claim in abatement or for some other reason is a question of fact, and from the stipulation in the case at bar it does not appear that the collection was so stayed, and for that reason *Section 611* cannot be availed of as a defense to the suit. As observed by the Circuit Court of Appeals, the title of the Section is "Collections Stayed By Claim in

Abatement", and the title should be used in construing the Section. From this it appears that in order for this Section to apply, the claim in abatement and not some other reason must have stayed the collection of the taxes.

4. Moreover, it is not every stay of collection by means of a claim of abatement that is within the scope of *Section 611*. In *General Counsel's Memorandum No. 5665*, published in *Cumulative Bulletin VIII-1, at page 130*, it was ruled that if a claim in abatement was filed after the Statute of Limitations had run, notwithstanding it then stayed the collection of the tax, yet such stay was not within the meaning of *Section 611*.

Apparently *Section 611* meant that if a claim in abatement did stay the collection of the taxes *until after the Statute of Limitations on their collection had run*, then the payment of them should not be treated as an overpayment under *Section 607*. No claim in abatement could operate to stay the collection of taxes any longer than a reasonable period after its rejection. In the case at bar the Statute of Limitations did not run on the collection of the taxes until March 22, 1923. The sixth paragraph of the stipulation shows that the claim in abatement was rejected on December 27, 1922. After the rejection of this claim the Collector had three months lacking five days in which to collect the taxes, before the Statute of Limitations on their collection expired. He did not attempt to collect them until November 19, 1924, or one year, ten months and twenty-two days after the rejection of the abatement claim, although he had a reasonable time after the rejection of the abatement claim and before the expiration of the Statute of Limitations within which to make their collection. Inasmuch as after the abatement claim was rejected, ample time remained

to collect the taxes before the expiration of the Statute of Limitations, how can it be said that the abatement claim postponed the collection of the taxes until after the Statute had run?

5. The Circuit Court of Appeals, for the Ninth Circuit, in *Huntley, Collector, v. Gile, et al, 32 F. (2d) 857*, reversing the judgment of the District Court, held that *Section 611*, retroactively applied, was constitutional on the supposed authority of *United States v. Heinszen & Co., 206 U. S. 370*, and *Rafferty, Collector, v. Smith, Bell & Co., 257 U. S. 226*. The *Rafferty case* follows the *Heinszen case*. In the *Heinszen case* two justices dissented, one did not participate, and Mr. Justice Harlan specially concurred on the ground that the suit was against the United States and it had a right to attach any conditions to its right to be sued or to take away that right. In considering *Section 611* these two cases are distinguished in *Clinton Iron & Steel Co. v. Heiner, 30 F. (2d) 542*, at pages *544* and *545*, and by another judge of the same Court this distinction was concurred in in the opinion in *Erie Coal & Coke Co. v. Heiner, 33 F. (2d) 135*.

In the case of *Pepsin Syrup Company v. Schwaner, 35 F. (2d) 197*, the Court held that Congress had not the power to give *Section 611* retroactive effect and relied on the rule which is plainly stated in *17 Ruling Case Law* at pages *674* and *675*. In this connection see also *William Danzer & Co., Inc., v. Gulf & Ship Island Railway Co., 268 U. S. 633*.

DeLima v. Bidwell, 182 U. S. 1, was a suit against the Collector as distinguished from a suit against the United States. In that case the Court divided five to four, but

at pages 199 and 200 of the majority opinion the following statement appears:

> "As the action in this case was brought March 13, 1900, eleven days before the Act was passed, the right to recover the money sued for could not be taken away by the subsequent act of Congress. Plaintiffs sued in assumpsit for money which the Collector has in his hands justly and equitably belonging to them. To say that Congress could by a subsequent act deprive them of the right to prosecute this action would be beyond its power."

In the case of *United States v. Heinszen, 257 U. S. 226,* the above statement is quoted and disagreed with, but the ground set forth by Mr. Justice Harlan in his specially concurring opinion was alone sufficient for a decision in that case.

The Sections under consideration in the case at bar do not withdraw the defense of the Statute of Limitations. Any taxpayer who has not paid the tax claimed and who has that defense may make it and they are making it successfully before the Board of Tax Appeals. It withdraws no defense, but on the contrary it seeks, if construed as contended for by the Government, to give the defendant an immunity which he did not have before its enactment, and to deprive petitioners of their property and transfer it to the defendant in his official capacity.

All of which is respectfully submitted,

JOHN E. HUGHES,
Counsel for Petitioners.